

July 11, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 9, 2003

Case No.: TIA-0026

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we are remanding the application to the DOE Office of Worker Advocacy for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 73411(9). In general, a worker in that group is eligible for an award if the worker was a "member of the Special Exposure Cohort" or if it is determined that the worker sustained the cancer in the performance of duty. *Id.* Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed on Amchitka Island, Alaska prior to 1974 and were exposed to ionizing radiation in the performance of duty related to the

Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. §73411(14)(B). Those tests occurred in October 1965, October 1969, and November 1971, respectively. The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, it is intended to aid qualified individuals in obtaining workers' compensation benefits under state law. The DOE program provides for an independent physician panel assessment of whether a DOE contractor employee has an illness related to exposure to a toxic substance during employment at a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers.

The DOE has issued regulations, which are referred to as the Physician Panel Rule. See 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Under the EEOICPA, a physician panel reviews an application to determine whether the illness or death that is the subject of the application arose out of and in the course of the individual's employment, and exposure to a toxic substance, at a Department of Energy facility. 42 U.S.C. § 7385o(d)(3). The relevant regulation amplifies this standard, providing that a physician panel must determine "whether it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8.

1/ See www.eh.doe.gov/advocacy.

The Physician Panel Rule provides for an appeal process. 10 C.F.R. § 852.18. An applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office determinations. An applicant may appeal a determination by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final determination by the Program Office not to accept a physician panel determination in favor of an applicant.

The applicant in this case worked for various DOE contractors at the DOE's Amchitka, Alaska underground nuclear test site. He filed applications with both the DOL and DOE programs, based on a diagnosis of colon cancer. The applicant received a DOL award, based on membership in the Special Exposure Cohort. The instant case concerns his application to the DOE program, the second program under the EEOICPA.

The DOE Office of Worker Advocacy referred the application to a physician panel for review, and the panel issued a negative determination. To determine the applicant's exposure, the panel relied on (i) a 1998 report prepared by Dr. Rosalie Bertell, entitled "Summary of Data on Potential Worker Exposures to Ionizing Radiation, Amchitka, Alaska", and (ii) the opinion of Jeffrey L. Kotch, a DOL health physicist, see January 25, 2002 DOL Notice of Final Decision. For reasons discussed in the determination, the panel calculated the applicant's radiation exposure based on the reported background radiation level at the site. The physician panel considered this exposure, along with the applicant's age and the applicant's heredity, and concluded that it was "unlikely that the minimal radiation exposure that he had was contributory" to the development of the colon cancer. Determination at 4.

The physician panel's determination was accepted by the DOE Office of Worker Advocacy. See April 11, 2003 Physician Panel Case Review and May 7, 2003 Letter from DOE to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In his appeal, the applicant contests the physician panel determination. The applicant contends that the physician panel determination understates his radiation exposure and fails to give consideration to evidence supporting a link between his exposure and his cancer.

In response to the appeal, we requested a copy of the applicant's file from the DOE Office of Worker Advocacy. That file includes material that the applicant submitted to the DOE, as well as documents concerning the applicant's DOL proceeding.

II. Analysis

A. The Physician Panel Determination

As an initial matter, we note that the Physician Panel performed a conscientious review of the application. The Panel's determination followed a prescribed format, included detailed calculations of the applicant's radiation exposure and risk of colon cancer, addressed the impact of the applicant's age and hereditary, and discussed information favorable to the applicant. The consideration of the application was complicated by the apparent lack of a single, clear and comprehensive statement of the applicant's periods of employment and his duties during those periods.

As explained below, despite the conscientious effort of the physician panel, the determination did not take into consideration all of the periods of claimed employment, duties, and evidence. Accordingly, we are remanding the application for further consideration. We suggest that on remand, and prior to further consideration, the applicant be asked to either (i) confirm that the information below is complete or (ii) supplement the information so that it is complete.

B. The Applicant's Level of Radiation Exposure

The applicant maintains that the physician panel determination did not consider all his periods of employment at the site nor the level of exposure associated with the type of work he performed during those periods. The appeal did not specifically identify those periods of employment, but stated that the applicant had provided them to DOE. The appeal also did not identify the nature of the applicant's duties, except to state that they included moving tailings.

1. The Applicant's Periods of Employment

The application includes a form for listing employment history. The form contains separate blocks for each employment. Each block provides for the contractor's name and address, the starting and

ending dates of the employment, and the applicant's position title and duties. The first page of the form for employment history has blocks for two employers and a second page provides blocks for additional employers.

The file contains the first page of the employment history form. On that page, the applicant listed two employers, covering the periods June 1964 to November 1964, and April 1965 to November 19, 1965. The physician panel based its determination on those two periods.

The applicant's assertions about additional periods of employment are not clear. In his appeal, the applicant states that he worked on the site before and after each of the underground tests. He does not identify those periods but states that they are reflected in his application and submissions. The application and submissions, however, sometimes have incomplete or conflicting dates and do not give a clear picture of the applicant's employment.

We do find, however, that the file supports the conclusion that the applicant had a period of employment not considered by the physician panel. That period was September 1967 to September 1968, and is documented in records from the DOL proceeding, specifically a union official affidavit.

2. The Nature of the Applicant's Employment

The applicant described his work in his employment history and an undated letter in the file (Bates No. 00040). In general, the applicant described himself as a laborer and his duties as stemming, well logging, handling mud lines, dismantling the structure over "ground zero," and unloading barges and airplanes. In his appeal, he states that since this work involved movement of the tailings, the applicant received radiation exposure above background levels.

The physician panel described the applicant's job as "heavy equipment" operator. The panel generally described the applicant's work as work that did not fit within the categories of worker exposure discussed in Dr. Bertell's report. Accordingly, the physician panel concluded that the applicant did not have radiation exposure apart from the general background radiation at the site.

We believe that the physician panel should have looked more closely at, and specifically addressed, the applicant's duties, both with respect to the report and in general. The physician panel should have considered whether the duty of unloading supplies placed him in the second category of exposures described in Dr. Bertell's report, i.e., exposures associated with the receipt, movement, and storage of radioactive materials. In addition, the physician panel should have considered whether the applicant's work involved radiation exposure, even if the particular work does not fit in the categories listed in Dr. Bertell's report. Dr. Bertell's report purports to identify the primary sources of radiation exposure and, therefore, does not rule out radiation exposure from other sources.

3. October 25, 2002 Physician Statement

The applicant contends that the physician panel did not address an October 25, 2002 physician statement by Dr. Lawrence L. Reynolds. Dr. Reynolds states that the applicant's child was born with congenital birth defects that could have been due to the applicant's radiation exposure. Although the physician panel did address other information favorable to the applicant, this evidence was in the application file and should also have been addressed. See 10 C.F.R. § 852.12(c)(1).

4. The January 9, 2003 Physician Statement

The applicant contends that the physician panel did not give proper consideration to a January 9, 2003 statement by Dr. John H. Ward, the physician who was responsible for the applicant's treatment following his 1997 surgery for colon cancer. In his one sentence statement, Dr. Ward opines that the applicant's radiation exposure at the test site was probably a substantial factor in causing, aggravating or accelerating the applicant's condition. Dr. Ward does not, however, provide or refer to any supporting findings or analysis for that conclusion.

The physician panel's failure to specifically refer to Dr. Ward's statement was not a deficiency. We note that since Dr. Ward provided no supporting findings or analysis, the only favorable "information" that need be addressed was Dr. Ward's conclusory statement that the applicant's illness was linked to radiation exposure. The physician panel determination clearly sets out the basis for its disagreement with such a conclusion. Accordingly, its failure to specifically refer to Dr. Ward's opinion is not a deficiency in the determination.

5. The DOL Award

The applicant also contends that the physician panel failed to give proper consideration to the DOL award. Under the DOL program, the applicant was eligible for an award because (i) he was a member of the Special Exposure Cohort, i.e., he was at Amchitka before 1974, and (ii) he developed colon cancer after the beginning of his employment there. See 20 C.F.R. § 30.210(a)(1). Thus, as the physician panel correctly noted, the applicant's DOL award does not represent a finding that the applicant meets the causation standard of the Physician Panel Rule. Accordingly, the physician panel did not err with respect to the significance of the DOL award.

C. Further Steps

Based on the discussion in Parts B.1, B.2, and B.3 above, we have concluded that the application should be remanded for further consideration. As discussed above, the file indicates that the following employment, duties, and evidence should be considered: (i) three periods of employment at the site - June 1964 to November 1964, April 1965 to November 19, 1965, and September 1967 to September 1968, (ii) a discussion of the nature of the applicant's work during those periods - stemming, well logging, handling mudlines, and dismantling the structure over ground zero, and (iii) the physician's statement concerning the applicant's child. In addition, prior to any further consideration, the applicant should be asked to (i) specify which duties he performed during each period and (ii) confirm that there are no other duties or employment periods.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0026 be, and hereby is, granted as set forth in Paragraph 2 below.
- (2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 11, 2003